"in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

The only relevant provision in our Evidence Ordinance excluding professional confidences is section 126, which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him and in the course of his employment as such. This rule is founded on the principle that the conduct of legal business without professional assistance is impossible and on the necessity, in order to render such assistance effectual, of securing full and unreserved intercourse between the two. This privilege does not protect professional disclosures made to clergymen or doctors: see *Phipson* on Evidence, 10th Edition, para. 587 and commentaries in *Sarkar* on section 126 of the Indian Evidence Act 1872. The answer to the first question, therefore, must be in favour of admissibility.

As to the second question, the only point of substance is where the incriminating statement is in the nature of a confession. The short answer is that such a statement is not admissible if it is excluded by any of sections 24, 25 and 26 of our Evidence Ordinance. It is to be observed that in *Kuruma* v. *The Queen* their Lordships' enunciation of principle is qualified in these terms:—

"It is right, however, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary, and therefore one obtained by threats or promises held out by a person in authority is not to be admitted."

Finally, in answer to the third question, we are of opinion that section 24 of the Evidence Ordinance clearly applies. The psychiatrist in a mental hospital obviously is a person in authority in the institution where he conducts routine examination of a patient. Hence any inducement, threat or promise proceeding from him, having reference to the charge against the patient, must render any self-incriminatory statement by the patient inadmissible.

Before concluding we should perhaps add a few words on the examination of medical witnesses where the defence of insanity is raised. It is almost invariably the case that the doing of the criminal act is provable by extraneous evidence, so that proof of this ingredient in the charge needs no reinforcement whatever by any such witness. His examination should be directed only to ascertain the accused's state of mind at the time of commission of the offence and not for any other subsidiary purpose. Where, however, in the rarest of cases, the only proof of commission of the offence by the accused must be sought in an admission to the medical witness, we are of opinion that it must clearly be proved, as a condition precedent, that the accused was sane, before evidence connecting the accused with the offence is admissible. It goes without saying that such evidence may still be excluded under the provisions of section 24 of the Evidence Ordinance.

Order accordingly.

KARUPPIAH CHETTIAR v. SUBRAMANIAM

[F.C. (Ong C.J. (Malaya) Gill & Aii F.JJ.) May 19, 1971]

[Kuala Lumpur — Federal Court Civil Appeal No. 108 of 1970]

Land Law — Sale of land — Issue document of title not delivered — Unregistered transfer — Transferee entering caveat to protect interest — Prohibitory ordr issued against interest in the land by judgment creditor — Application to set aside prohibitory order — Priorities — Whether equitable principles applicable to National Land Code — National Land Code, ss. 5, 206, 322 327, 334, 337.

Practice and Procedure — Prohibitory Order — Issue of — R.S.C. 1957, O. 43 r. 2 — Judgment creditor — Sale of land — R.S.C. 1957, O. 43 r. 11.

On November 8, 1968, one Mohamed Sharjudin sold all his interest of an undivided 2/6 share in a certain piece of land in the mukim of Ulu Kinta, to the respondent. Nothwithstanding the sale, Mohamed Sharjudin remained registered as the proprietor of the said land because he was unable to deliver to the respondent the issue document of title to enable registration of the memorandum of transfer which was duly executed and stamped on the date of the sale. However, on November 13, 1968, the respondent applied for and obtained entry of a private caveat on the register document of title to the land in order to protect his interest.

The appellant was one of the executors of the estate of one Suppiah Chettyar deceased. It appeared that Mohamed Sharjudin had deposited the issue document of title as security for loans granted to him by the said deceased who apparently had taken no steps to lodge a lien-holder's caveat against the land. On March 3, 1969, Mohamed Sharjudin executed a second memorandum of transfer in respect of the same land in favour of the executors of the deceased's estate. It was on inspection of the register document of title that the executors came to know about the private caveat lodged by the respondent.

On April 22, 1969, a prohibitory order was issued against the said interest in the land in execution proceedings at the instance of the appellant who had obtained judgment against Mohamed Sharjudin in Civil Suit No. 668 of 1968, on a claim for the recovery of money lent. The prohibitory order was said to have been subsequently entered on the register document of title under the provisions of the National Land Code. On May 9, 1969, the respondent intervened in the proceedings by taking out a summons in chambers for an order that the prohibitory order be set aside on the ground that the judgment debtor had no beneficial interest in the said undivided share in the land.

At the hearing of the summons in chambers, counsel for the parties informed the court that by consent the issue to be tried was whether the unregistered transfer dated November 8, 1968 and supported by the entry of caveat on November 13, 1968, affected the prohibitory order obtained by the appellant on April 22, 1969, and registered subsequently, and the rights of the attaching creditor. The learned trial judge made the order asked for, against which the appeal arose. The appellant contended that (a) the learned judge was wrong in holding the prohibitory order to be of no effect against the caveat; (b) the learned judge erred in holding that a caveat protected land from attachment in execution of a court order; and (c) the intervenor only had a right *in personam* which could not prevent attachment and sale of the land in question.

Held dismising the appeal, (Ong C.J. (Malaya) and Gill F.J; Ali F.J. dissenting): (1) in this case Mohamed Sharjudin having sold his entire interest in the land and received payment in full held the legal estate only as a bare trustee for the respondent, who was the equitable owner;

(2) the appellant, as judgment creditor, could only take whatever interest the debtor had and in this case the debtor had parted with his whole interest in the land;

(3) the learned judge in this case was right in setting aside the prohibitory order as there was nothing which could be put up for sale.

Cases referred to:-

(1) *Chung Khiaw Bank Ltd.* v. *United Overseas Bank Ltd.* [1970] 1 M.L.J. 185, 186, P.C.

(2) *Whitworth* v. *Gaugain* (1844) 67 E.R. 444, 447.

(3) *Ng Boo Bee* v. *Khaw Joo Choe & Ors.* (1921) 14 S.S.L.R. 90, 95.

(4) *Wilkins & Ors.* v. *Kannammal & Anor.* [1951] M.L.J. 99, 100.

(5) *Butler* v. *Fairclough* (1916-17) 23 C.L.R. 78, 91.

(6) *Abigail* v. *Lapin* [1934] A.C. 491.

(7) *Peninsular Land Development Sdn. Bhd.* v. *Ahmad* [1970] 1 M.L.J. 149.

(8) *In re Cuming* (1869) 5 Ch. App. 72.

(9) *Sobhagchand Gulabachand* v. *Bhaichand* (1882) I.L.R. 6 Bom. 194, 202.

(10) *Coleman* v. *De Lissa* (1885) 6 N.S.W.R. (Eq.) 104, 111.

(11) *Sockalingam Mudaliar* v. *Ramasamy Chettiar & Anor.* [1938] M.L.J. 237.

(12) *Pillay & Anor.* v. *Official Assignee & Ors.* Perak Civil Appeal No. 7 of 1928 (unreported).

(13) *Ng Yew* v. *Perumal Mudaly* (1924) 5 F.M.S.L.R. 21.

(14) *Alagappa Chetty* v. *Ng Guan Yin* (1921) 5 F.M.S.L.R. 236.

(15) *Ng Chin Siu* v. *Muthiah Chetty & Anor.* [1939] M.L.J. 80.

(16) *Tong Swee King* v. *Pegang Mining Co. Ltd. & Ors.* [1967] 2 M.L.J. 214.

(17) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52, P.C.

FEDERAL COURT.

F. C. Arulanandom for the appellant.

M. Sivalingam for the respondent.

Ong C.J. (Malaya): Mohamed Sharjudin was and still is the registered proprietor of an undivided 2/6 share in the land held under Grant No. 11746 in Ulu Kinta. On November 8, 1968 he sold all that interest to Subramaniam and executed a transfer thereof in statutory form. Subramaniam was, however, unable to present the instrument of transfer for registration by reason of the vendor's failure to deliver up the issue document of title. He therefore took the precaution of entering a private caveat on the register to protect his interest. This caveat was registered on November 13, 1968.

It appears from a perusal of the appeal record that Mohamed Sharjudin subsequently executed a second transfer of the same 2/6 share to AR.SP. Karuppiah Chettiar on March 3, 1969. The Chettiar then discovered the existence of Subramaniam's private caveat, presumably upon presenting his transfer for registration. On March 5, 1969 the Chettiar's solicitors wrote to Subramaniam demanding that his caveat be withdrawn. The demand was rejected. On April 14, 1969 the Chettiar obtained judgment against Mohamed Sharjudin for non-payment of a debt. Whether the judgment was for the amount of the consideration involved in the nugatory transfer is not clear, but this would seem a logical assumption. Upon this judgment the Chettiar obtained a prohibitory order on April 22, 1969. It was duly entered on the register document of title against the judgment debtor's 2/6 share in Grant No. 11746.

On May 9, 1969 Subramaniam intervened by summons in chambers, in the Chettiar's action against Mohamed Sharjudin, applying to set aside the prohibitory order. At the hearing of the summons it was expressly agreed between counsel for the parties that the only issue to be determined was whether the unregistered transfer dated November 8, 1968, supported by the entry of caveat on November 13, 1968, affected the prohibitory order obtained on April 22, 1969 and the rights of the attaching creditor. In other words, the intervenor's case is that the prohibitory order was in effect nugatory, since the order cannot override his beneficial interest in the property attached. On the other hand, the attaching creditor's contention was that, as a caveat only forbids dealings by the registered proprietor, it cannot affect the rights which the attaching creditor obtains by a prohibitory order.

The learned judge decided in favour of the intervenor and allowed his application. The judgment creditor now appeals against such decision on three grounds. First, it is contended that the judge was wrong in holding the prohibitory order to be of no effect against the caveat; secondly, that he erred in holding that a caveat protected a land from attachment in execution of a court order; and thirdly, that the intervenor only had a right *in personam* which could not prevent attachment and sale of the land in question.

In my opinion the answer to the first and third grounds is summed up in a short passage from the judgment delivered by Lord Wilberforce in *Chung Khiaw Bank* v. *United Overseas Bank Ltd.*[1] thus: —

"... under the general law, apart from the provisions as to registration, and in certain circumstances even where such special provisions exist, the judgment creditor can only take whatever interest the debtor has and, ... in such a case, questions of priority and correspondingly of postponement through failure to register, do not arise."

His Lordship had cited with approval *Whitworth* v. *Gaugain*[2] in which Wigram V.C. said: —

"I feel that I stated the general principles correctly in *Langton* v. *Horton* when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it."

In *Ng Boo Bee* v. *Khaw Joo Choe & Ors.*[3] Sproule J., whose decision was upheld on appeal, said: —

"I have to decide, not any question of priorities, but the question of the right of the execution creditor to seize at all. It is not a dispute between various creditors of a debtor whose land is rightly under seizure; it is an issue whether plaintiff may seize and sell another man's land because of the accident of the legal title still remaining in defendant's name at the time of seizure.

I think it is very clear that only such beneficial interest as a judgment debtor possesses can be seized, and that the order of attachment is an assurance affecting only such beneficial interest in the land. As counsel on both sides agreed tersely to express it, a judgment creditor may seize only what the debtor can lawfully sell. Where it is admitted, as in this case, that there is no beneficial interest in the debtor at all, no question as to priority of registration can arise."

In the instant case Mohamed Sharjudin having sold his entire interest in the land and received payment in full undoubtedly holds the legal estate only as a bare trustee for Subramaniam, who is the equitable owner. Want of registration cannot affect his equitable rights. Section 206 of the National Land Code, which provides for registration of instruments of dealing in land, contains an express proviso in sub-section (3) that "nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein". It is trite law that when the court orders the sale of a judgment debtor's property it cannot sell more than what the judgment debtor himself is entitled to sell.

I turn now to the second ground of appeal, that a caveat is no bar to a prohibitory order. Broadly speaking, it must depend in each particular case on the caveator's interest. On the facts of this case I think the learned judge was perfectly right in setting aside the prohibitory order. To seek its restoration seems to me a supreme exercise in futility when it is clear beyond peradventure that under such order there is nothing which can be put up for sale. I would accordingly dismiss this appeal with costs.

Gill F.J.: Mohamed Sharjudin bin Haji Mohamed Nengah, a judgment debtor, remains registered as the proprietor of an undivided 2/6th share in the land held under Grant for Land No. 11746 for Lot No. 19899 in the Mukim of Ulu Kinta, although he sold all his interest in the land to Subramaniam s/o Muthappa, the respondent to this appeal, on November 8, 1968. This is because he was unable to deliver to the respondent the issue document of title to enable registration of the memorandum of transfer which was duly executed and stamped on the date of the sale. But in order to protect his rights to the land under the transfer, the respondent applied for and obtained entry of a private caveat on the register document of title to the land on November 13, 1968.

The appellant AR.SP. Karuppiah Chettiar and one AR. L. Suppiah Chettiar are the executors of the estate of A.R.K. Suppiah Chettyar deceased. From the correspondence between the solicitors for the respondent and the appellant in March, 1969, it would appear that Mohamed Sharjudin had deposited the issue document of title as security for loans granted to him by the said deceased who apparently had taken no steps to lodge a lien-holder's caveat against the land. On March 3, 1969 Mohamed Sharjudin executed a second memorandum of transfer in respect of the same land in favour of the executors of the deceased's estate. It was on inspection of the register document of title that the executors came to know about the private caveat, being caveat presentation No. 361/68, which had been lodged by the respondent.

On April 22, 1969 a prohibitory order was issued against the said interest in the land in execution proceedings at the instance of the appellant who had obtained judgment against Mohamed Sharjudin in Civil Suit No. 668 of 1968 in the High Court at Ipoh on a claim for the recovery of money lent. The prohibitory order is said to have been subsequently entered on the register document of title under the provisions of the National Land Code. On May 9, 1969 the respondent intervened in the proceedings by taking out a summons in chambers for an order that the prohibitory order issued at the instance of the appellant be set aside on the ground that the judgment-debtor had no beneficial interest in the said undivided share in the land. No objection was taken to the intervention, but the application was opposed on the ground that as the appellant had acquired no legal interest in the land, which still stood registered in the name of the judgment-debtor, he could not object to its seizure and sale by the appellant as the judgment-creditor of the registered proprietor.

At the hearing of the summons in chambers counsel for the parties informed the court that by consent the issue to be tried was whether the unregistered transfer dated November 8, 1968 and supported by the entry of caveat of November 13, 1968 affected the prohibitory order obtained by the plaintiff/appellant on April 22, 1969 and registered subsequently, and the rights of the attaching creditor. In the event Pawan Ahmad J. made the order asked for, against which order the appellant has now appealed.

The main argument in support of the appeal is that the respondent has only a right *in personam* against the judgment-debtor and therefore cannot prevent the land from being attached and sold in execution of a judgment of the High Court. This argument is founded on the provisions of subsection(1) of section 206 of the National Land Code, the effect of which is summed up in the *Torrens System in Malaya* by S. K. Das at page 164 as follows: —

"The execution of an instrument purporting to affect land does not effect a transfer, charge, or lease but is an inchoate act which can be completed only by registration of a memorial; until registration no instrument is effectual to pass any land or any interest therein but it operates merely as a contract so as to create equitable estates or rights so long as the interests of persons acting and dealing on the faith of the entries in the register with the registered proprietor are not unduly prejudiced. Until registration the instrument is inoperative in law to pass the title or render the land as security; the instrument has no binding effect on the land and is only a personal obligation giving a right *ad rem*."

A short answer to that argument lies in subsection (3) of section 206 of the National Land Code which says that "nothing in sub-section (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein". Now, the transaction in the present case was a contract of sale and purchase in relation to the interest in the land in question, followed by the execution of a memorandum of transfer which complied with the relevant requirements of the National Land Code. There has been no suggestion that there was anything fraudulent about the sale. The effect of that transaction was to give the respondent an equitable estate in or at least an equitable right to the land. That such equitable estates and rights are recognized under the Torrens

System of registration of titles to land is not open to question. As Taylor J. said in the course of his judgment in the Court of Appeal in *Wilkins & Others* v. *Kannammal & Anor*,[4] with which judgment Foster Sutton C.J. and Wilson J. concurred, "the Torrens law is a system of conveyancing; it does not abrogate the principles of equity." If further authority is required for that proposition, it is to be found in the following statement of Griffith C.J. in *Butler* v. *Fairclough*,[5] which was approved by the Privy Council in *Abigail* v. *Lapin*: [6]

"It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognize equitable estates and rights except so far as they are precluded from doing so by the Statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority."

Lord Wright in delivering the judgment of their Lordships of the Privy Council in *Abigail* v. *Lapin* said at page 500:

"The Real Property Act, 1900, of New South Wales, embodies what has been called, after the name of its originator, the Torrens system of the registration of title to land. ... It is a system for the registration of title, not of deeds; *the statutory form of transfer gives a title in equity until registration,* (the italics are mine), but when registered it has the effect of a deed and is effective to pass the legal title; ... it has long been held that equitable claims and interests in land are recognized under the Real Property Acts. This was held in *Barry* v. *Heider* and in *Great West Permanent Loan Co.* v. *Friesen;* for the protection of such equitable interests or estates, the Act provides that a caveat may be lodged with the registrar by any person claiming as *cestui que trust,* or under any unregistered instrument or any other estate or interest; the effect of the caveat is that no instrument will be registered while the caveat is in force affecting the land, estate or interest until after a certain notice to the person lodging the caveat. Thus, though the legal interest is in general determined by the registered transfer, and is in law subject only to registered mortgages or other charges, the register may bear on its face a notice of equitable claims, so as to warn persons dealing in respect of the land and to enable the equitable claimant to protect his claim by enabling him to bring an action if his claim be disputed."

It seems clear from the above authorities that, by virtue of the memorandum of transfer, the respondent obtained an equitable title to the land. To put it in other words, the judgment-debtor in this case, by executing a memorandum of transfer on receipt of the purchase price in full, had divested himself of all beneficial interest in the land and vested it in the respondent. S. K. Das on the *Torrens System in Malaya* at page 381 goes so far as to say that "if the purchase money is paid to the vendor in his lifetime he becomes a trustee of the legal estate. It is otherwise if it has not been fully paid and discharged." This court said something to the same effect in *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad*.[7] As Giffard L.J. said in *In Re Cuming*,[8] the distinction between an executed and an unexecuted contract is sound. In the present case, apart from the payment of the purchase price in full, a formal document of transfer was duly executed and delivered to the respondent.

That brings me to the question as to the rights of a judgment-creditor over the property of the judgment-debtor in execution proceedings. In this connection, Wigram V.C. in *Whitworth* v. *Gaugain* as far back as 1844 said:

"I feel that I stated the general principle correctly in *Langton* v. *Horton* when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor, subject to every liability under which the debtor himself held it."

In *Sobhagchand Gulabachand* v. *Bhaichand*[9] Westropp C.J. said:

"When the court sells the right, title and interest of a judgment-debtor in property, we think that it cannot be regarded as selling more than the judgment-debtor could himself honestly sell. He could honestly sell only subject to any equities existing against himself on the property; and if, by concealment of a *san*-mortgage, or other mortgage, he sold property as free of that charge, he would commit a fraud. The court cannot be deemed to do that which would be a fraud if done by the judgment-debtor. If, then the court sell only the right, title and interest of the judgment-debtor subject to all existing equities against the property sold, the registration of the court's conveyance (the certificate of sale) cannot enlarge the scope of that conveyance, and thus discharge the property from any unregistered incumbrance which was binding on the judgment-debtor".

A prohibitory order as defined in section 334 of the National Land Code and issued under 0.43, r.2 of our Rules of the Supreme Court, 1957 is analogous to a writ of *fieri facias*. In *Coleman* v. *De Lissa*[10] Faucett A.P.J. said:

"It seems to me that the entry of the writ of *fi. fa.* does not necessarily bind all the estate or interest that appears on the face of the certificate of title to belong to the holder of the certificate; but that all it can mean is that any subsequent dealing with the land shall take effect only after the writ so entered has been satisfied, or shall be void as against the sheriff's sale under the writ. But I do not think that any previous *bona fide* transaction between the registered owner and another person, although not registered, of which, at all events, the purchaser at the sheriff's sale has notice, can be affected. The interest which the sheriff can sell is still, as it was before, the beneficial interest that was in the registered owner at the time of the entry or of the sheriff's sale".

Whitworth v. *Gaugain* and *Sobhagchand Gulabachand* v. *Bhaichand* were cited with approval in *Sockalingam Mudaliar* v. *Ramasamy Chettiar & Anor*.[11] in which Aitken J., following an unreported decision of the Court of Appeal in *Pillay and Anor* v. *Official Assignee & Ors*,[12] held that the unregistered charge in respect of which a caveat had been lodged and duly registered in the Land Office conferred on the plaintiff an equitable interest in the lands, which the court ought to protect, and that the lands could only be sold in execution subject to the plaintiff's unregistered charge. The Perak case of *Ng Yew* v. *Perumal Mudaly*[13] and the Johore case of *Alagappa Chetty* v. *Ng Guan Yin*[14] were cited by counsel for the first defendant to support his contention that sales in execution of a judgment-debtor's lands are subject only to legal interests vested in third parties. and not to any equitable interests. Aitken J. disposed of the Johore case[19] by saying: "I do not consider myself bound by it because (a) it is a decision of a court of first instance, (b) no question of notice arose therein, and (c) it turns in part on certain stringent

provisions in section 5 of the repealed Registration of Title Enactment, 1911, which are not reproduced in our present Land Code". As to the case of *Ng Yew* v. *Perumal Mudaly*, his Lordship pointed out that the Court of Appeal in Perak Civil Appeal No. 7 of 1928, to whom it was cited, had declined to follow it, so that it must be treated as having been impliedly overruled.

It is said that the learned judge misdirected himself when he held that the case of *Sockalingam Mudaliar* v. *Ramasamy Chettiar & Anor.* was authority for the proposition that a caveat would protect a land from attachment in execution of a court order. As I have already indicated, the arguments put forward against the plaintiff's claim in *Sockalingam Mudaliar's* case, on the basis of his unregistered charge in respect of which he had lodged a caveat, were that a caveat cannot take the place of registration, that it only prohibits the registered proprietor from making any transfer, charge or lease of the lands in question after the caveat has been lodged and registered, that it is only effectual as between caveator and caveatee and cannot affect an attachment and sale of the registered proprietor's interest in the land by way of execution, and that consequently a judgment-creditor who attaches and sells his judgment-debtor's lands has a right to sell them subject only to any legal interests vested in third parties. All those arguments were rejected by Aitken J. I would say, with respect to the learned judge, that they were rightly rejected. I must therefore reject the somewhat similar arguments which have been advanced in this case.

Counsel for the appellant in the present case has also sought to rely on *Ng Chin Siu* v. *Muthiah Chetty & Anor*[15] in which it was held that an attachment before judgment obtained *ex parte* and without notice to the registered proprietor was bad and must be set aside. Pedlow J. said in that case that a caveat under the Land Code only affects the registered proprietor and is no bar to a judgment-creditor. In my opinion, that statement of the law was given *obiter*. If it was meant to be the *ratio decidendi* of the case, with all respect to the learned judge, it was wrong.

The position in this case is somewhat similar to that in *Sockalingam Mudaliar's* case. In that case there was an unregistered charge in respect of which a caveat had been lodged, and the court held that the equitable interests conferred by that unregistered charge ought to be protected. In the present case, the unregistered memorandum of transfer conferred a title in equity on the purchaser for the protection of which he has similarly lodged a caveat. In that case it was held that the land could be sold only subject to the unregistered charge. To say in this case that the land must be sold subject to the unregistered transfer is to say that the land cannot be sold because the judgment-debtor has divested himself of all his beneficial interest in the land by that transfer, so that there is nothing to sell. If the land cannot be sold, what is the point in allowing a prohibitory order to stand on the register? I would say therefore that the learned judge in this case was quite right in following *Sockalingam Mudaliar's* case to set aside the prohibitory order.

The learned judge was also right in basing his decision on sub-section (3) of section 322 of the Land Code which says that "the effect of any private caveat expressed to bind a particular interest only shall, subject to sub-sections (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of (a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto)". Sub-section (4) provides that "a private caveat shall not prohibit the registration, endorsement or entry of any instrument, claim or lienholder's caveat where the instrument was presented, or the application for endorsement or entry received, prior to the time from which the private caveat takes effect". Sub-section (5) clearly does not apply to the circumstances of this case.

It is to be observed that sub-section (3) speaks of any instrument of dealing. The word "dealing" as defined in section 5 of the Code does not include any caveat or prohibitory order. It can therefore be argued that the entry of the private caveat lodged by the respondent did not prohibit the endorsement of the prohibitory order issued at the instance of the appellant. But sub-section (4) clearly says that a private caveat shall not prohibit such endorsement of any instrument only where the application for it was made prior to the time from which the caveat takes effect. The application for endorsement of the prohibitory order in this case was made more than five months after the date from which the private caveat took effect. If a prohibitory order is an instrument within the ordinary dictionary meaning of the word, it would appear that so long as the entry of the private caveat appeared on the register no endorsement of the prohibitory order could be made on it. It follows therefore that if any endorsement of the prohibitory order was in fact made, as would appear from what counsel for the parties informed the court about the issue to be tried when the summons in chambers came on for hearing, it was wrongly made.

It is further to be observed that the respondent's solicitors, by their letter dated March 10, 1969 in reply to the appellant's solicitors' letter of March 5, 1969, denied that their client had any knowledge of the loans alleged to have been made by the deceased to Mohamed Sharjudin. As regards the appellant's solicitors' demand for the removal of the caveat, failing which they threatened to commence proceedings for its removal, the respondent's solicitors replied that any application for the removal of the caveat would be contested to the hilt. The result was that the appellant refrained from taking any proceedings. In my opinion, the appropriate remedy for the appellant was at that stage to apply to the Court under section 327 of the National Land Code for the removal of the respondent's private caveat, rather than to proceed to lodge a prohibitory order against the land, the effect of which could not be anything but nugatory.

Assuming for the purpose of this appeal that the prohibitory order was rightly entered on the register, can it be said that that entry nullified the effect of the prior entry of the caveat? I do not think so. As from the date of the memorandum of transfer, the

validity of which has never been in question, the judgment-creditor is merely the ostensible owner of the land. The effect of the transfer, in the words of Lord Wright in *Abigail* v. *Lapin* as I have already said, was to give the respondent a title in equity to the land. The respondent lodged the caveat in order to protect his title. If, as is conceded by counsel for the appellant, the caveat prohibits any further dealing in the land by the registered proprietor, there is an implied prohibition against any such dealing on his behalf by his creditor. A creditor stands in the place of his debtor. What a judgment-debtor cannot lawfully sell therefore cannot be sold at the instance of his judgment-creditor. In other words, a judgment-creditor may seize only that which his judgment-debtor can lawfully sell.

It has to be borne in mind that the issue and the endorsement on the register document of title of a prohibitory order are but the first step in execution proceedings. The next step in the proceedings is for the judgment-creditor to apply for sale of the land under O.43, r.11. The sale is subject to the following conditions. It must not take place until the expiration of fourteen days from the registration of the prohibitory order. The particulars and conditions of the sale must be drawn up by the sheriff and submitted for the approval of a judge. After the land has been sold and the purchaser has paid the purchase price, the judgment-creditor or any person entitled to share in a rateable distribution of assets or whose interests are affected by the sale may apply to the court or a judge to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it. The purchaser can also apply to the court or a judge to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. If the sale is set aside the purchaser is entitled to an order for repayment of his purchase money (with or without interest as the court or a judge may direct) against any person to whom it has been paid. Where no such applications are made or they are made and disallowed, the court or a judge must make an order confirming the sale, and thereupon the sale becomes absolute but not until after the expiration of one month from the date of the sale. The order confirming the sale must contain a sufficient description of the property or interest sold and the name of the purchaser and shall further declare that the title of the property sold shall vest in such purchaser upon registration of such order under the provisions of any written law relating to such land, and not before. Section 337 of the National Land Code says that an order confirming the sale "shall be sufficient authority for an officer of a court of competent jurisdiction to execute in favour of the purchaser at the sale the appropriate instrument of transfer under this Act in the name, and on the behalf, of the judgment-debtor".

It is to be observed that sub-section (3) of section 322 of the Code speaks of 'any certificate of sale'. The words 'certificate of sale' are defined in section 5 of the Code to mean any certificate issued to a purchaser on a sale either at the instance of a chargee or a lienholder. It may therefore be argued that sub-section (3) of section 322 does not apply to a sale in execution of a judgment. A short answer to that is that that sub-section also prohibits the registration of any instrument of dealing directly affecting any interest in land, and any appropriate instrument of transfer as stipulated in section 337 of the Code would be an instrument of dealing directly affecting the interest in land.

As regards conflicting claims against a registered proprietor, S. K. Das on the *Torrens System in Malaya* at page 190 says:

> "In execution proceedings against the proprietor or in the event of his bankruptcy the maxim *nemo dat quod non habet* applies. Absolutely guaranteed title does not mean that the proprietor is necessarily the beneficial owner of the land and, therefore, until registration, conflicting claims against the proprietor in relation to the land arising out of legal or equitable obligations can only be determined by the ordinary principles and rules of law and equity except as expressly or by necessary implication modified by the Code. The title of the proprietor from the sheriff until registration is equitable only and subject to prior equities".

Thus, even if the land is sold in pursuance of the prohibitory order, and the issue is then to be decided on the basis of priorities, the respondent would have a prior equity to that of the purchaser at the sale. Moreover, it will still be open to the respondent to apply to have the sale set aside. If the sale is going to be abortive, as it must, why should the court put the parties to the expense and trouble of going through all the motions of O.43, r.11, and not nip it in the bud?

Before concluding the matter, I should perhaps say a few words about the procedure adopted by the respondent to have the prohibitory order set aside, although, as I have said before, no objection was taken to it by counsel for the appellant in the court below. That the respondent had a right to intervene is clear beyond any doubt since the decision of this court in *Tong Swee King* v. *Penang Mining Co., Ltd. & Ors,*[16] which was upheld by the Privy Council in *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.*[17] It is to be observed that the plaintiff in *Sockalingam Mudaliar's* case had at first adopted the same procedure but those proceedings came to naught, with the result that he brought a separate suit asking for a declaration that the lands could only be sold in execution subject to his unregistered charge. The lands were twice proclaimed for sale, and on each occasion it was stated that the rights of the registered owner would be sold subject to the caveat lodged by the plaintiff. The prohibitory order was extended from time to time and was still in force when the case was heard and concluded The appellant in this case could have asked the court to disallow intervention and direct the respondent to file a separate action. Assuming that intervention was disallowed and a separate action was filed, the issue to be tried between the parties would still be the same. Pending the trial of the action, the prohibitory order would have to be extended from time to time and the sale, if ordered, postponed, resulting in added costs. But the outcome of the action, I have no doubt whatsoever in my mind, would also be the same. The courts do not encourage multiplicity of proceedings to no purpose. On that ground also therefore the appellant is out of court.

For the reasons I have stated, I would dismiss this appeal with costs.

Ali F.J.: This is an appeal from an order of the High Court Judge, Ipoh, setting aside a prohibitory order obtained by the appellant on April 22, 1969 in civil suit No. 668/68. The order setting aside was made following an application by the respondent by way of summons in chambers dated May 9, 1969.

The background to the present proceedings may be briefly stated as follows: In civil suit No. 668/68 the appellant sued Mohamed Sharjudin bin Haji Mohamed Nengah for a debt and on April 14, 1969 obtained judgment. Subsequently, he applied and obtained the prohibitory order in question. Clearly this was to ensure that if the judgment debtor fails to satisfy the judgment debt, the appellant could proceed to execution and apply to the court for an order to sell the land or interest in the land affected by the prohibitory order. So far, it seems to me, he has not applied to the court. It may be that it will all come to nought. The prohibitory order may lapse on the expiration of six months under section 338(1) of the National Land Code or it may be that the judgment debtor will satisfy the judgment and render it necessary to withdraw the prohibitory order under section 339(1) of the National Land Code. On the other hand, the appellant might be compelled to proceed to execution and apply under section 256 of the National Land Code for an order of sale. Until then it is pointless for anyone having a claim to any interest in the land to intervene. For these reasons I do not think it necessary or relevant to consider at this stage whether the prohibitory order poses a threat to any one who may have a claim to an interest in the land affected by it.

Notwithstanding what I have said above, the respondent in this appeal decided to intervene by filing a summons in chambers to have the prohibitory order set aside. I say 'intervene' because the respondent was not and has not been made a party to the civil suit in which the prohibitory order was obtained. It may be that he would be granted an order to intervene if he had asked for one but the fact remains he has not obtained such an order.

The summons in chambers came up for hearing before Pawan Ahmad, J. who might or might not be the judge who granted the appellant the prohibitory order. No doubt under section 339(1) of the National Land Code the court has power to make an order for the withdrawal of a prohibitory order. But the making of such an order has to be based on some grounds. It may be founded on the fact that the judgment debt has been satisfied; or on the ground of mistake because the land is no longer registered in the name of the judgment-debtor. No such ground could possibly be advanced here because the judgment debtor has, apparently, not satisfied the judgment debt and he is still registered as the proprietor of the 2/6th share in the land affected by the prohibitory order. To set aside the prohibitory order merely on the ground that the land is affected by a private caveat previously entered by the respondent inevitably assumes that the caveator has proved or established that he is entitled to the interest in the land. In this case the respondent clearly has a claim by reason of an unregistered transfer of the interest in the land to him by the judgment-debtor, Mohamed Sharjudin bin Haji Mohamed Nengah. That was the basis of the entry of his private caveat sometime in November 1968. He ranks as one of those persons entitled to enter such a caveat under section 323(1) of the National Land Code. But, to my mind, he is nothing more than a mere claimant. Regardless of what I may think of the merits of his claim, his present interest in the land is only that of a caveator. A caveat is designed to protect his interest inasmuch as the prohibitory order is designed to protect the interest of a judgment-creditor. Neither has yet any established right to an interest in the land affected until it is determined by a court of law. In this way I cannot see the relevancy of discussing the equitable right of the respondent to the land or the effect of registration under the Torrens system. The question before the trial court, pure and simple, was whether the caveat *per se* has the effect of prohibiting the subsequent entry of the prohibitory order in question. Even the agreed issue before the learned trial judge poses this very question. Both caveats and prohibitory orders are creatures of statute, the National Land Code. While there can be no objection to considering the general law relating to these two matters, I think it is only right and proper to examine, first, the relevant provisions of the National Land Code. Section 322 to section 329 all deal with caveats. Section 322(2) and (3) are concerned with the effect of a private caveat. Generally speaking, the effect of a private caveat is to prohibit the registration, endorsement or entry of any of the matters expressly specified in those provisions. The question which arises, therefore, is whether the entry of a prohibitory order is one which is prohibited by section 322(3). Paragraph (a) of the sub-section need only be considered. A prohibitory order is not an instrument of dealing falling within section 299(1) of the Code. Nor is a prohibitory order a certificate of sale relating to land. A certificate of sale is one which is issued either under section 259(3)(a) or under section 265(4)(a) of the National Land Code. A certificate is issued under section 259(3)(a) only after an attaching creditor has obtained a court order to sell the land. Clearly, therefore, a prohibitory order and a certificate of sale are two different things. Therefore, construing section 322(3) of the National Land Code, as I do, there is nothing in it which can lead me to the view that the private caveat in this case has the effect of prohibiting the entry of the prohibitory order in question. Since there is nothing in the statute to support the decision of the trial court, I will now turn to the general law.

The following passage from the judgment of the trial judge requires consideration:

> "In the present case the prohibitory order obtained by the respondent from the court was only made on 22nd April, 1969 a period of more than 5 months after the applicant's caveat had been registered and therefore it would be of no effect against the applicant's caveat. This is amply borne out by the case of *Sockalingam Mudaliar* v. *Ramasamy Chettiar & Anor*".

This affirmatively answers paragraph 6 of the respondent's affidavit which is in these terms:

> "A prohibitory order against the said undivided share was registered after the defendant had executed a transfer in my favour and in view of this I am advised and verily believe that the prohibitory order which came later cannot

be effective because at the time of the order the defendant had no beneficial interest in the said undivided share." A

If the prohibitory order has no effect on the respondent's caveat, it is difficult to understand why the respondent should waste time and money to have it set aside. That the prohibitory order has no such effect is, of course, true. If it has, section 336(1) of the National Land Code would have so provided. It has not. But the common issue at the hearing was not B the same as that raised in paragraph 6 of the respondent's affidavit. It reads thus:

"By consent the issue is whether the unregistered transfer dated 8th November, 1968 and supported by the entry of caveat on 13th November 1968 affect the prohibitory order obtained by the Plaintiff/Respondent on 22nd April 1969 and registered subsequently and the rights of an attaching C creditor."

It speaks about the effect of the respondent's caveat on the appellant's prohibitory order. In other words it reverses the issue raised in the affidavit. I have already considered this point in relation to the relevant statutory provisions and have found nothing in the National Land Code which, either expressly or by D necessary implication, would have the effect suggested in the common issue. I will now turn to the decision in *Sockalingam Mudaliar* v. *Ramasamy Chettiar & Anor.* which the learned trial judge in the instant case seems to think supports his conclusion. With respect, I do not think so. Shortly stated, in the case cited an unregistered chargee having entered a caveat E to protect his interest, brought an action against an attaching creditor seeking a declaration that the land affected by his caveat was not liable to attachment. Alternatively, he prayed for a declaration that the attachment was subject to his unregistered charge. In support of the main declaration the chargee had argued, citing Indian and English cases, that he acquired an equitable interest under the registered charge and F this interest, he contended, was entitled to the same protection as any registered legal interest in the land. It was necessary to adopt this line of argument because the attaching creditor in his defence had not only maintained that the prohibitory order was a valid legal attachment but that he was entitled to sell the land attached free from any charge in favour of the plaintiff G and to receive the proceeds of sale to the extent of his judgment in priority to any claim by the plaintiff. In the event it became necessary for the trial judge in that case to consider the question whether the unregistered chargee had an equitable interest in the land and, if so, whether such interest should be protected. Both questions were answered in favour of the chargee H and in the concluding passage of his judgment on page 231, Aitken J. said:

"...I do not think for a moment that he is entitled to a declaration that these 3 pieces of land are not liable to attachment, but in my opinion he is entitled to a declaration that they can only be sold in execution subject to his unregistered charge."

I

These words clearly do not "amply" bear out the conclusion arrived at by the learned trial judge in the instant case. Nor are we here asked to make any declaration.

In my judgment this case is not governed by authority inasmuch as the only question for decision is whether the High Court Judge was right in setting aside the prohibitory order. That is the question that can only arise from the respondent's summons in chambers. There is no doubt, of course, that the respondent was perfectly entitled to enter a caveat. But this does not automatically confer on him the right to go to the land office to have his interest in the land registered. He must first apply to the court for an order under section 417 of the National Land Code to vest in him the interest in the land. Section 420 of the National Land Code provides, *inter alia*, that a vesting order made by the court does not have effect until it has been registered pursuant to the section. Until the application is before the court it is hardly fair or just that the attaching creditor be deprived of his means of protecting his interest. Furthermore, there is something in the affidavits which makes it all the more important that the caveator's claim be not determined now. In his affidavit the respondent gave November 13, 1968 as the date on which he applied for the entry of his caveat. His application and statutory declaration confirm this. The appellant has challenged the truthfulness of this date in his affidavit affirmed on July 21, 1969. It would appear that in a letter dated November 14, 1968 M/s Arulanandom & Co. had applied to the Registrar of Titles for an abstract of the title to the land in question This abstract which was dated November 15, 1968 makes no mention of the fact that the respondent's caveat had been entered on the register documents of title as required by section 324(2) of the National Land Code. It might be that it was entered after November 15, 1968 or some later date. I am not saying that there was any fraud or anything like that. But the appellant's affidavit does seem to suggest that there may well arise some allegation of fraud subsequently when the respondent applies to the court for a vesting order. For these reasons, I shall be content to say that both parties should be left with their rights to protect their respective interests and this means that the appellant's prohibitory order should be allowed to remain on the register.

I would accordingly allow this appeal with costs here and below.

Appeal dismissed.

Solicitors: *Arulanandom & Co.; Lim Cheng Ean & Co.*